IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 4539 of 1994

For Approval and Signature:

Hon'ble MR.JUSTICE S.M.SONI

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

STATE OF GUJARAT

Versus

PRATAPSINH M PADHIYAR

Appearance:

PUBLIC PROSECUTOR for Petitioner

MR JASHWANT MAKWANA for the opponent

CORAM : MR.JUSTICE S.M.SONI

Date of decision: 14/03/96

ORAL JUDGEMENT

ORAL JUDGMENT:

State has moved this application for cancellation of bail granted by Additional Sessions Judge, Baroda in Misc.Criminal Application no.812 of 1994.

Opponent, along with one Arvindkumar Mohanlal Bhavsar, is arraigned in Padera Police Station C.R.No.-173 of 1994 for commission of an offence under

section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' for short). After the opponent and said accused being arrested, they moved the learned Addl.Sessions Judge, who enlarged them on bail. This order of bail is under challenge in this petition.

Learned A.P.P. has challenged the order on the ground that the same is bad inasmuch as learned Judge ought not to have taken into consideration the alleged non-compliances of sections 41, 42 and 50 of NDPS Act, which is held to be mandatory by the Supreme Court in the case of State of Punjab vs.Balbir Singh reported at (1994) 3 SCC 299. It is also contended that the learned Addl. Sessions Judge has misread the judgment of this court in the case of Hathi @ Mangalsinh Ramdayalji vs. State of Gujarat reported at 1993 (2) G.L/R. 1743. Learned A.P.P. Mr.Bukhari further contended that non-compliances of certain provisions as alleged is a matter of evidence and whether there is a total non-compliance thereof or not can only be decided after the trial is over. The same cannot be decided simplicitor from the F.I.R. and/or chargesheet. Therefore, the conclusion arrived at by the learned Addl. Sessions Judge as to breach of the said provisions is an erroneous inference not warranted by the said judgmentin the case of Balbir Singh (Supra). He equally contended that the judgment in the case of Hathi @ Mangalsingh (supra) is also misread inasmuch as there in that case, the court has relied on the report of the Forensic Science Laboratory and not simplicitor on the name of the substance found from the possession of the accused, namely, posh no doda. Mr.Bukhari, therefore, contended that the bail granted to the opponent is based on an erroneous assumption and misreading of the law and the learned Judge if had read it properly would have come to the conclusion otherwise than what he has arrived at. He, therefore, contended that the bail should be cancelled and the opponent be remanded to judicial custody.

Learned Advocate Mr.Makwana, appearing for the respondent, has contended that the application for cancellation of bail is not maintainable inasmuch as (1) there is no violation of any condition of bail by the respondent; (2) there is no apparent mistake of law; and (3) there is no point of law for determination. He further contended that it will be improper to hold that there is an improper appreciation of evidence on record. Mr.Makwani also contended that the petition is liable to be dismissed on the ground that the petitioner-State has made false statements in the petition, viz. that the

Public Prosecutor was not heard and that no time was given to file affidavit-in-reply. So far as the last contention as to non-maintainability of the petition on the question of false statement is concerned, there was no statement on record initially on oath which was required to be denied. Any statement in the memo, if comes out to be a false one, it need not be a ground for dismissal of the petition and in any case it has once been admitted. It is required to be considered by the court whether that false statement affects the case of the respondent and whether the court was misled by such a statement. I do not find any such effect on the case. Thus, there is no substance in the contention that the petition should be dismissed because of the said false statements.

Mr.Makwana further contended that (1) there is no prima facie case established by the Prosecution against the respondent-accused, in as much as, there is nothing on record to show the possession by the accused except a statement in FIR; (2) Panchnama was not made on spot; and (3) the Panchas were not of the locality, where the search was carried out. He also contended that when, according to the Prosecution, the contraband narcotic substance is found from a Wada, that Wada is neither in possession nor of ownership of respondent. These questions were not the questions considered before the trial Judge. Trial court has considered bail application filed on 5th September, 1994, while search was carried out on 26th August, 1994 and FIR is lodged. So, the learned Judge has considered the bail application only on the basis of First Information Report. First Information Report, in my opinion, very clearly states that from the Wada on the rear of the house of the accused, contraband narcotic substance is found. Whether the possession of wada is of the respondent-accused or not, is to be shown by the respondent under sec.37 of NDPS Act. In the instant case, the learned Judge also has not taken into consideration the principles for bail laid down in Section 37 of NDPS Act. Section 37 of the NDPS Act provides that :-

"37. Offences to be cognizable and non-bailable.-(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-

(a) ... ...

(b) no person accused of an offence

> punishable for a term of imprisonment of five years or more under this Act shall be released on bail or on his own bond unless-
>
> (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
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> (ii) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
>
> (2) The limitations on granting of bail specified in Cl. (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force on granting of bail."

Thus, what is required to be satisfied by the learned Judge is whether there are reasonable grounds for believing that he is not guilty of such offence. Under Section 439 of the Code of Criminal Procedure (Code for short), what is required to be established by the Prosecution is that there is a prima facie case against the accused while under Section 37(1) of N.D.P.S. Act, what is required to be concluded by the learned Judge is that there are reasonable grounds for believing that he is not guilty of such offence, meaning that there is no material on record which primarily show that the accused is not guilty of the offence alleged. In the instant case, FIR discloses the fact that the contraband narcotic substance is found from the Wada of the respondent-accused. Thus, it cannot be said that there are reasonable grounds for believing that he is not guilty of such offence. Once the possession is established and substance found from possession is alleged to be a narcotic substance, the offence under the Narcotics Act is prima facie established. Thus, it can be said that there are reasonable ground to hold him guilty. Whether possession is conscious and the

substance found is a narcotic substance is a matter of evidence. Till then, there is a prima facie case that the accused is guilty of the offence. The burden to prove that there is no prima facie case is on the respondent-accused in view of the provisions of Section 37 of N.D.P.S. Act. Therefore, there is no question of holding that there is no prima facie case as ordinarily required to be established in an application under Section 439 of the Code.

There is another novel argument advanced by the learned Advocate Mr.Makwana, which is stated to reject the same. The bail order is a discretionary and interlocutory one and, therefore, this application for cancellation is not maintainable, contends Mr.Makwana. Mr.Makwana further contended that the application under Section 439(2) of Code will only be maintainable if there is any breach of the condition imposed by the Court. If there is no breach of the condition, then application under Section 439(2) of Code for cancellation is not maintainable. This argument of Mr.Makwana may hold good if Section 439(1) of Code provides that the bail can be granted only after imposing conditions. Section 439(1) of the Code does not contemplate for imposing any condition as a condition precedent to grant bail. It is the discretion of the learned Judge, while granting bail, to impose condition or not. In that case, if the argument of Mr.Makwana is accepted, then, in the cases where the Court decides not to impose any condition, then bail granted by the court can never be cancelled by it, despite sufficient cause.

Mr.Makwana contended that no specific ground for cancellation is made out in the memo of petition. In criminal proceedings, there are no specific rules of pleading like civil proceedings, wherein specific grounds are required to be made out. Challenge to the order is sufficient and grounds therefor may be stated during the course of arguments. This is only because the personal liberty if involved can never be circumscribed. At the most, the Court may grant the other side an opportunity to meet with such a contention, if he is taken by surprise. However, not making out specific grounds in the memo for cancellation does not deprive the court to consider the challenge to the order granting bail.

In the instant case, the learned Judge has not come to the conclusion as to whether the alleged wada is proved to be in possession of the respondent or not, contends Mr.Makwana. The learned Judge has only recorded the argument advanced by Mr.Makwana that the Wada is not

of the ownership of the respondent and he has not given any finding on the same; in my opinion rightly, because it otherwise would prejudice the case of either.

(The learned Judge has granted bail, placing reliance on two judgments, one of Balbir Singh (supra) and another of Hathi alias Mangal Singh (supra). So far as Section 50 of the NDPS Act is concerned, it is attracted when a person accused of offences punishable under NDPS is required to be searched and not his premises. Therefore, much time was spent by the learned counsel in arguing his case on the ground of non-compliance of Section 50 despite this Court telling him that this Court is in agreement with his argument, which is based on the judgment in Balbir Singh (supra), that non-compliance of Sections 41, 42 and 50 vitiates the trial. The question is whether non-compliance of any of these provisions can be inferred from the First Information Report only ? In the First Information Report, compliance of Section 41, Section 42 or Section 50 is not required to be stated. What is required to be stated in the First Information Report is the facts constituting offence as required under Section 154 of the Code. Sub-section (1) of Section 154 reads as under :-

"154.(1) Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf...."

This sub-section contemplates for reducing in writing information relating to the commission of a cognizable offence. Sub-section (1) of Section 37 of N.D.P.S. Act provides that every offence punishable under the NDPS Act is a cognizable one, and the information has been taken down in writing. Thus, sec.154 of Code does not contemplate for the formalities and procedure of search, seizure and arrest to be stated in the FIR. These are all matters of procedure, no doubt, required to be strictly followed, but are not required to be stated in the First Information Report.

Section 42(2) of NDPS Act provides that any information received of an offence under the NDPS Act is

required to be taken down in writing and is also required to be sent forthwith to the superior official. The facts showing compliance of sec.42(2) of NDPS Act are not required to be stated in the First Information Report. It is a matter of evidence and Investigating Officer (IO) who is normally examined as a last witness may prove that the information in writing is taken down and sent to his superior official and how sent. For the search after sunset and before sunrise, whether I.O. was required to assign the reasons and whether reasons are assigned or not, and if not why, can be explained by him. Thus, compliance or not of Sections 41, 42 and 50 of the NDPS Act cannot be taken into consideration simply from silence of compliance in F.I.R. and at the stage of consideration of bail application. Therefore, finding of the learned Judge that all mandatory provisions of Sections 41, 42 and 50 of the Act are not complied with on the basis of First Information Report is erroneous and not warranted by any provision of law. The conclusion arrived at by the learned Judge is not only erroneous, but is contrary to the provisions of Section 37 of the NDPS Act. If the learned Judge has proceeded on the basis of a wrong assumption of law and facts and has arrived at a particular conclusion, which he would not have otherwise come, that conclusion is required to be set aside and corrected by this Court. In this view of the fact, there is no difficulty to set aside the order to this extent.

Apart from this, the learned Addl. Sessions Judge has relied on a judgment in the case of Hathi Mangalsinh (Supra), and it has been held that the substance found does not fall within the definition of 'poppy straw' as defined in clause 2(xviii) of NDPS aCT. In my opinion, there is a misreading of the said judgment. That judgment does not hold that substance known as posh-na-doda is not a poppy straw. To decide whether it is poppy straw or not, it is necessary to have the opinion of the expert. In the case of Hathi Mangalsinh (Supra), in the opinion of the expert from Forensic Science Laboratory, it was not shown that the substance falls within the definition of 'poppy straw'. Any substance popularly known as posh no dodo may or may not be 'poppy straw' and/or 'Opium poppy', but normally it contains opium poppy as posh-na-doda normally belongs to the family of 'papaveraceae'. However, it is the expert who can opine whether the substance falls within the definition of 'Narcotic substance'. In the case of Hathi @ Mangalsinh (Supra), the expert had not opined that the fragments of poppy capsules alleged to be found from possession of the accused are the poppy capsules of

plant ofPapavar Somniferum Linn. It is also not opined by the expert that the said fragments of poppy capsules belongs to any other species of Papavar member of Papavaraceae family. Non-mention by the expert as to which species of member of Papavar of the Papaveraceae family the fragments of Papavar capsules found from the accused belong and/or from the said species or member opium or any phenanthrene alkaloid can be extracted and the same may be declared to be opium poppy by notification in the official gazette by the Central Government does not bring that substance found within the definition of opium poppy. It is necessary to say that substance analysed is either (a) the plant of the species Papaver Somniferum L. and (b) the plant of other speices of Papavar from which opium or any phenanthrene alkaloid can be extracted and which the Central Governmentmay, by notification in the Official Gazettee, declare to be opium poppy for the purpose of this Act to show the substance to be poppy straw as defined in NDPS Act and none other members and its species though of Papavaraceae family, yet opium cannot be extracted. In absence of any expert opinion, it cannot be said that it is not a narcotic substance. Thus, the learned Addl.Sessions Judge has wrongly relied on the judgment in Hathi Mangalsinh (Supra) and held that there is no prima facie case.

The conclusion arrived at by the learned Addl.Sessions Judge that there is no prima facie case is not warranted by any evidence or mateiral on record and the same is based on misreading of the above judgments.

Thus, grant of bail is based on some misconception of law and facts and, therefore, the said order is required to be quashed and set asside. I would have remanded the matter back to the learned Addl.Sessions Judge to consider the case afresh after properly reading the said judgments and applying the principles properly, if there would have been a case made out on facts also. In the instant case, narcotic substance is alleged to have been found from the possession of the accused, for which there is no satisfactory explanation; nor has he produced any pass or permit.)

I am supported in my above conclusion by the judgment of the Supreme Court in the case of The State vs.Captain Jagjit Singh (1962) SCR 622. There, the Supreme Court has held as under:-

"The first question therefore that we have to

decide in considering whether the High court's order should be set aside is whether this is a case which falls prima facie under Sec.3 of the Act. It is, however, unnecessary now in view of what has transpired since the High Court's order to decide that question. It appears that the respondent has been committed to the Court of Sessions along with the other two persons under sec.120-B of the Indian Penal Code and under sections 3 and 5 of the Act read with sec.120-B. Prima facie, therefore, a case has been found against the respondent under Sec.3, which is a non-bailable offence. It is in this background that we have now to consider whether theorder of the High Court should be set aside. Among other considerations, which a court has to take into account in deciding whether bail should be granted in a non-bailable offence, is the nature of the offence; and if the offence is of a kind in which bail should not be granted considering its seriousness, the court should refuse bail even though it has very wide powers under sec.498 of the Code of Criminal Procedure. Now, sec.3 of the Act erects an offence which is prejudicial to the safety or interests of the State and relates to obtaining, collecting, recording or publishing or communicating to any other person any secret official code or password or any sketch, plan, model, article or note or other document or information which is calculated to be or might be or is intended to be, directly or indirectly useful to an enemy. Obviously, the offence is of a very serious kind affecting the safety or the interests of the State. Further where the offence is committed in relation to any work of defence, arsenal, naval, military or air force establishment, or station, mine, minefield, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval, military or air force affairs of Government or in relation to any secret official code, it is punishable with fourteen years' imprisonment. The case against the respondent is in relation to the military affairs of the Government, and prima facie therefore the respondent if convicted would be liable upto fourteen years' imprisonment. In these circumstances, considering the nature of the offence, it seems to us that this is not a case where discretion, which undoubtedly vests in the court, under sec.498 of the Code of Criminal Procedure, should have been exercised in favour

of the respondent. We advisedly say no more as the case has still to be tried.

It is true that two of the persons who were prosecuted along with the respondent were released on bail prior to the commitment order; but the case of the respondent is obviously distinguishable from their case inasmuch as the prosecution case is that it is the respondent who isin touch with the foreign agency and not the other two persons prosecuted along with him. The fact that the respondent may not abscond is not by itself sufficient to induce the court to grant him bail in a case of this nature. Further, as the respondent has been committed for trial to the court of Session, it is not likely now that the trial will take a long time.In the circumstances,we are of opinion that the order of the High Court granting bail to the resopondent is erroneous and should be set aside.We, therefore,allow the appeal and set aside the order of the High Court granting bail to the respondent. As he has already been arrested under the interim order passed by this court, no further order in this connection is necessary...."

In the result, the petition is allowed. Rule is made absolute. Respondent Pratapsinh Madhavsinh Padhiyar is directed to surrender to judicial custody within a week from today. In default, the learned Sessions Judge is directed to issue warrant of arrest.

Now, the learned Advocate for the respondent states that the order be stayed for four weeks as the respondent wants to approach the Supreme Court. In the facts and circumstances of the case, the request is turned down.
